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Nos. 88-1249 and 88-1250

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

SOUTHERN BELL TELEPHONE & TELEGRAPH CO., ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

NEW ENGLAND TELEPHONE AND
TELEGRAPH COMPANY, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

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*ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENTS

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In the Supreme Court of the United States

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SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENTS

In its amicus brief in support of petitioners, the Communications Satellite Corp. (COMSAT) correctly observes (at 4) that in 1988 the Federal Communications Commis-

sion ordered COMSAT to refund amounts collected in excess of a previously prescribed rate of return (*COMSAT*, 3 F.C.C. Rcd 2643 (1988)) and that the Commission there relied on the court of appeals' ruling in the present case to reject the claim that the refund order was beyond the Commission's statutory authority (*id.* at 2645). That Commission decision is currently on review in the D.C. Circuit, which has deferred briefing pending the disposition of the petitions in these cases. We file this brief supplemental memorandum in response to COMSAT's amicus submission, since we had overlooked the *COMSAT* case in preparing our brief in opposition to the petitions for a writ of certiorari in these cases.

Notwithstanding the Commission's reliance in *COMSAT* on the ruling at issue here, the pendency of the *COMSAT* decision in the court of appeals does not undermine our submission that the continuing importance of the present ruling is insufficient to warrant review. First, besides *COMSAT*, there is no other outstanding decision raising the refund issue decided by the court of appeals here. Second, in *COMSAT* itself, as in the present cases, the Commission ordered refunds only with respect to rates that took effect subject to investigation and were made subject to an accounting order under Section 204.* See 3 F.C.C. Rcd at 2644, 2645-2647; *COMSAT*, 2 F.C.C. Rcd 3706, 3708 (1987) (proposing refund order). Third, COMSAT's appeal from the Commission's *COMSAT* decision may well raise other issues that might make it unnecessary for the court of appeals to consider the Commission's refund

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**COMSAT*, CC No. 80-634, Mem. Op. & Order (released Aug. 2, 1984) (allowing tariff changes to take effect subject to investigation with issues to be designated in subsequent order, citing Section 204); *COMSAT*, CC No. 86-634, Mem. Op. & Order (released Nov. 8, 1985) (designating issues and requiring accounting under Section 204(a)).

authority at all. Thus, the question presented by petitioners here—the Commission's refund authority outside the Section 204 context—might not be or have to be resolved by the court of appeals on review of the *COMSAT* decision, and there is no other pending case raising the issue.

Accordingly, for the reasons set forth in our brief in opposition, the present petitions should be denied.

Respectfully submitted.

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Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY	1
I. The FCC Did Not and Could Not Rely on Section 204 of the Communications Act	2
II. The Question Presented Is of Continuing Significance	5
III. The FCC May Enforce Its Prescriptions, But, Absent an Accounting Order, Not by Refunds	6
CONCLUSION	8

TABLE OF AUTHORITIES

CASES: Page

City of Piqua v. FERC, 610 F.2d 950 (D.C. Cir. 1979) 7
Massachusetts Trustees v. United States, 377 U.S. 235 (1964) 3
Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975) 6
SEC v. Chenery Corp., 318 U.S. 80 (1943) 3

ADMINISTRATIVE DECISIONS:

American Telephone & Telegraph Co., 58 F.C.C.2d 1 (1976) 4
Memorandum Opinion and Order, *Annual 1988 Access Tariff Filings*, CC Docket No. 88-1, Phase I, 3 F.C.C. Rcd 2043 (1988) 5
Order Designating Issues for Investigation, *Annual 1988 Access Tariff Filings*, CC Docket No. 88-1, Phase II, 3 F.C.C. Rcd 3103 (1988) 5
Memorandum Opinion and Order, *Annual 1988 Access Tariff Filings*, CC Docket No. 88-1, Phase II, FCC 88-420, 4 F.C.C. Rcd —— (rel. Dec. 27, 1988) 5
Notice of Inquiry, *AT&T's Earnings on Interstate and Foreign Services During 1978*, 75 F.C.C.2d 412 (1979) 2
Memorandum Opinion and Order, *Communications Satellite Corp.*, 3 F.C.C. Rcd 2643 (1988) 5

STATUTES:

Communications Act of 1934
Section 4(i), 47 U.S.C. § 154(i) 6
Section 204, 47 U.S.C. § 204 ..... 2, 3, 4, 5
Section 205, 47 U.S.C. § 205 ..... 2, 7

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Respondents.

PETITIONERS' REPLY BRIEF

Apparently fearful that the Court will not accept the basis for the decisions below, respondents seek to deflect the Court's attention by claiming a basis for those decisions that was not advanced below and is legally unsupportable in any case. Respondents also attempt to evade review by claiming that the continuing significance of this case is uncertain, even though the FCC recently issued another order relying on the power challenged here.

Notwithstanding respondents' assertions of the FCC's general power to enforce its orders, the specific remedy of refunds to enforce a rate of return prescription exceeds Communications Act limitations on the FCC's powers. Rather than allow the FCC's statutory excess to escape scrutiny, this Court should grant a writ to review the decision below.

I. The FCC Did Not and Could Not Rely on Section 204 of the Communications Act.

Respondents now argue that the FCC's authority under Section 204 of the Communications Act [1] supports the judgment below independently of Section 205 [2] and that the existence of this separate ground counsels against review. To be sure, in the notice that started the agency inquiry leading to the orders upheld below, the FCC did raise for consideration its Section 204 powers, among others.[3] In the orders resulting from that initial inquiry and upheld below, however, the FCC did not rely on Section 204.[4] It did not even mention that provision in connection with the basis for its action.

Nor did the FCC's brief below rely on Section 204 or even suggest that provision supported its action. Indeed, the FCC's brief concedes that the agency could not and was not relying on Section 204.[5] Only when it came to

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[1] 47 U.S.C. § 204.

[2] 47 U.S.C. § 205.

[3] Notice of Inquiry, *AT&T's Earnings on Interstate and Foreign Services During 1978*, 75 F.C.C.2d 412, 416 (1979).

[4] *See* Pet. App. at 65a-68a; 109a-113a. References are to the Appendix in No. 88-1249.

[5] *See* Brief of Respondent FCC at 28, stating that "[i]f the Commission were to accept the position of the carriers in this case that it has no refund power except under Section 204 of the Act, the carriers would be free to ignore not just this rate of return prescription, but any prescription." In other words, the agency asserted the need for power under Section 205 because it believed that Sec-

oral argument, after briefs were filed and the issues joined, did agency counsel suggest that Section 204 was an alternative ground for the FCC's decision. The court below, however, properly rejected this tack, stating that Section 204 "does not apply to the circumstances of this case." [6] "The decision of a *lower court* . . . must be affirmed if the result is correct, 'although the lower court relied upon a wrong ground or gave a wrong reason,'" but "[t]he grounds upon which an *administrative order* must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943) (emphasis added).[7]

Even if the FCC had actually relied on Section 204 in its decisions below, which it did not, its reliance would have been unlawful. Although the FCC had suspended AT&T's 1976 rate filing and imposed an accounting order pending investigation, the issues that the FCC designated for investigation in connection with that accounting order—the only issues upon which a refund could later

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tion 204 was not available to it. Respondents here dismiss this concession as a mistaken oversight of Section 204's applicability. Opp. at 27 n.23. This oversight, whether or not it really was mistaken, may explain why the FCC did not rely on Section 204, but it does not change the fact that the FCC did not rely on that provision, despite respondents' labored suggestions now to the contrary.

[6] Pet. App. at 13a.

[7] Respondents' reliance (Opp. at 28) on *Massachusetts Trustees v. United States*, 377 U.S. 235 (1964), is misplaced. There is no indication here that the FCC was uncertain about the source of the power it claims (*compare id.* at 246), and it is doubtful that the FCC really mistook the statutory provisions on which, until now, it has consistently based its position (*compare id.* at 248). Indeed, the FCC continues here to defend its actions under those provisions. Moreover, here, unlike in *Massachusetts Trustees*, the dispute is not merely over a sum of money. Rather, the controversy here involves a fundamental question of agency power, with ramifications not only for other proceedings before the FCC, but also for proceedings before agencies governed by statutes like the Communications Act.

be ordered—involved matters of rate structure and cost allocation.[8] They had nothing to do with the basis for the refunds ordered here, namely, whether the proposed rates were designed to achieve the prescribed return.[9] There were no questions, for example, about the levels of cost or demand that AT&T had projected for its services. Quite to the contrary, the FCC stated that it could not "find the economic material filed in support of the tariff revisions inadequate or erroneous." [10] None of the matters designated for investigation in 1976, therefore, would have supported the refund ordered in 1984. Having failed to suspend the 1976 rates for investigation on rate of return grounds, the FCC could not and, not surprisingly, until now did not rely on Section 204 to order refunds.

Although the FCC may now claim Section 204 as the basis for its action, that will not change the basis for the ruling below, which sanctions agency action in excess of statutory authority and to the detriment of the careful balance of ratepayer and carrier interests struck by the Communications Act. Nothing, therefore, precludes the FCC in the future from relying on the decision below and proceeding outside Section 204, contrary to petitioners' statutorily protected interests. Indeed, the FCC did so as recently as this past December.[11] Thus, whatever the justification now given for the FCC's action, this Court should reject respondents' attempt to shelter the result below and should grant review here.

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[8] Under Section 204, the FCC may suspend rates and impose an accounting order pending a hearing on the rates only "upon delivering to the . . . carriers affected thereby a statement in writing of its reasons for such suspension." 47 U.S.C. § 204.

[9] *See American Tel. & Tel. Co.*, 58 F.C.C.2d 1, 2-3 (1976).

[10] *Id.* at 3.

[11] *See* discussion, *infra*, p. 5.

II. The Question Presented Is of Continuing Significance.

Respondents claim that a new approach to testing the reasonableness of carrier rates, which has been adopted for AT&T and proposed for exchange carriers, "would eliminate or reduce substantially the Commission's primary reliance on rate of return prescriptions . . . , at least for AT&T." Opp. at 28. This claim is hardly a ringing renunciation of the unlawful conduct for which petitioners seek review. The new approach has so far only been adopted for AT&T, and it is not clear that it will be adopted for exchange carriers or, if adopted, what form it will take. It is also evident, from the qualifications in respondents' claim here, that the FCC will continue to use rate of return prescriptions in significant respects.

Indeed, the FCC has recently asserted refund power beyond the scope of Section 204 in connection with allegedly excessive exchange carrier access charges [12] and over earnings by COMSAT.[13] Respondents even suggest that the FCC may still pursue a general policy of enforcing rate of return prescriptions through refunds (Opp. at 29) but that the Court should wait until then to review the refund matter. The question, however, is squarely presented now. Nothing is to be gained by deferring the matter to another day, while the FCC con-

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[12] Memorandum Opinion and Order, *Annual 1988 Access Tariff Filings*, CC Docket No. 88-1, Phase II, FCC 88-420, 4 F.C.C. Rcd —— (rel. Dec. 27, 1988). Indeed, unlike the agency proceedings below, in the access charge proceeding, refunds were ordered without any accounting order whatsoever anywhere in the proceeding. *See* Memorandum Opinion and Order, *Annual 1988 Access Tariff Filings*, CC Docket No. 88-1, Phase I, 3 F.C.C. Rcd 2043, 2044 (1988); Order Designating Issues for Investigation, *Annual 1988 Access Tariff Filings*, CC Docket No. 88-1, Phase II, 3 F.C.C. Rcd 3103, 3106 (1988).

[13] Memorandum Opinion and Order, *Communications Satellite Corp.*, 3 F.C.C. Rcd 2643 (1988).

tinues to transgress the Communications Act by using the power at issue.

III. The FCC May Enforce Its Prescriptions, But, Absent an Accounting Order, Not by Refunds.

The thrust of respondents' defense of the agency action upheld below is that refunds are a "necessary means of enforcing [return] prescriptions." [14] According to respondents, "once the validity of rate of return prescriptions and the Commission's authority to enforce such prescriptions are accepted, the power to require refunds is readily justified as a tool to enforce a rate of return prescription." [15] The question here, however, is whether, notwithstanding the FCC's power generally to enforce its orders, specific limitations contained in the Communcations Act's rate regulation scheme permit the particular manner of enforcement asserted. Claiming that refunds are a lawful enforcement tool because they are necessary to or inherent in the concept of a rate of return prescription only avoids that question.[16]

Although the 1975 *Nader* decision did establish that the FCC could prescribe a rate of return,[17] the court there did not undertake to rule on the specific ways in which such a prescription could prospectively operate or be enforced —the issue presented here. In particular, the court was not required to decide, nor did it decide, whether a prescription could limit returns not only by requiring the filing of properly targeted rates, or by requiring new

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[14] Opp. at 15.

[15] *Id.* at 17.

[16] Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), upon which respondents ultimately rely for the FCC's authority, requires that orders issued pursuant to that provision be "not inconsistent with" the Act.

[17] *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975).

rates to be filed when existing rates get out of line, but also by imposing refunds of the returns actually achieved.

The rate regulation scheme of the Communications Act, however, precludes enforcement of a rate of return prescription through refunds, absent an appropriate accounting order. Requiring refunds in order to enforce a return prescription would be to impose, in respondents' own words, "a backward-looking remedial mechanism" (Opp. at 17), contrary to the Section 205 requirement that the FCC only order rate actions "to be thereafter observed." This remedy is the essence of the retroactive ratemaking that the Communications Act and other federal regulatory acts prohibit, whether the remedial purpose is to return excess earnings or recover a shortfall.[18]

Under the regulatory scheme of all these acts, carriers as well as ratepayers run the risk that rates will miss the mark, producing deficient as well as excess earnings. Any corrective must be prospective—"thereafter observed." Under respondents' scheme, however, ratepayers run no risk and are guaranteed, through refunds, that there will be no excess earnings, while carriers must absorb shortfalls. If any enforcement is necessary here, therefore, it is enforcement of the Communications Act's regulatory scheme. This Court should review the decision below for that purpose.

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[18] *See, e.g., City of Piqua v. FERC*, 610 F.2d 950, 954 (D.C. Cir. 1979) ("The retroactive ratemaking rule . . . bars utility refunds for past excessive rates, or the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate").

CONCLUSION

For the foregoing reasons, petitioners' request for a writ of certiorari should be granted.

Respectfully submitted,

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